FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 21 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 535

ELLEN EMERSON, *Petitioner*,

v.

HOLLOWAY CONCRETE PRODUCTS COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioner.

ALTON G. PITTS,
135 Wall Street,
Orlando, Florida,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	11
Appendix A—Opinions below	A1
Appendix B—Judgment below	A2
Appendix C—Statutes involved	A29

AUTHORITIES

CASES:

Cline v. *Powell*, 141 Fla. 119, 192 So. 628 9
Goett v. *Union Carbide Corp.*, 361 U.S. 340 ..7, 8, 9, 10, A29
Graham v. *A. Lusi, Limited*, 206 F. 2d 223 7
Hess v. *United States*, 361 U.S. 314 .....7, 10
Holley v. *The Manfred Stansfield*, 269 F. 2d 317, certiorari denied *sub nom. Reederei Blumenfeld, G. M.-B. H.* v. *Holley, Adm'x*, 361 U.S. 883 .....9, A29
Kermarec v. *Compagnie Generale*, 358 U.S. 625 ..... 6, 9
Klepper v. *Breslin*, Fla., 83 So. 2d 587 9
Nolan v. *Morre*, 81 Fla. 594, 88 So. 601 9
The Tungus v. *Skovgaard*, 358 U.S. 588 ..2, 7, 8, 9, 10, A29
Union Carbide Corp. v. *Goett*, 278 F. 2d 319, certiorari denied, Oct. 10, 1960 (No. 247, this Term) 8, 10, A29
United Pilots Assn. v. *Halecki*, 358 U.S. 613 ..7, 8, 10, A29
Whiteley v. *Webb's City*, Fla., 55 So. 2d 730 9

STATUTES:

Fla. Laws 1953, c. 28280, § 1 9
Fla. Stat. 1959, § 768.01 .....8, 9, A29
Fla. Stat. 1959, § 768.03 8
N. J. Stat. Ann. 2A:31-1 ..... A29
Va. Code 1950, § 8-633 ..... A29
W. Va. Code 1955, § 5474 [55-7-5] A29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ELLEN EMERSON, *Petitioner*,

v.

HOLLOWAY CONCRETE PRODUCTS COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ELLEN EMERSON, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 29, 1960.

OPINIONS BELOW

The prevailing and dissenting opinions below (Appendix A, *infra*, pp. A1-A27) are reported at 282 F. 2d 271.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A28) was entered on June 29, 1960. By order of Mr. Justice Black entered on September 20, 1960, the time for filing a petition for a writ of certiorari was extended to and including November 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case turning on the scope of liability for wrongful death imposed by a State statute in respect of torts on navigable waters within its borders, a United States Court of Appeals may properly fail to inquire whether the State statute incorporated the maritime law's rules as to the scope and measure of liability.

2. Whether a State wrongful death statute, which speaks of "boats," "vessels" and "ships," and of libels and proceedings *in rem* and *in personam*, is to be construed as adopting admiralty standards of liability in respect of death by wrongful act occurring on navigable waters within the State.

3. Whether the rule of *The Tungus* v. *Skovgaard*, 358 U.S. 588, should be reconsidered insofar as it holds that, in a case of wrongful death occurring on navigable waters within a State, the State wrongful death statute may impose a more limited liability than the general maritime law, and that such limitation will be given effect by a United States court sitting in admiralty.

STATUTES INVOLVED

The Florida wrongful death statute involved in this case, and other State wrongful death statutes construed in similar cases, are set out in Appendix C, *infra*, following p. A28.

STATEMENT

The Statement that follows is taken almost exclusively from the opinion of the court below (Appendix A, *infra*, pp. A1-A4), as indicated by the quotation marks in which it is set off.

Respondent, Holloway Concrete Products Company, Inc., hereinafter referred to either as "Holloway" or "the corporation," is "engaged in the concrete business and in the

distribution of building material. Its principal place of business was at Orlando, Florida. Franklin Williamson was its president and general manager. Thomas C. Ross was its construction engineer. In the spring of 1954 Williamson negotiated for Holloway the purchase of the 27-foot inboard cruiser, the Overtime. The boat was powered by a gasoline motor. When not in use it was berthed at the Sanford Boat Works in Sanford, Florida. The boat was used, for a time after it was purchased, for the pleasure of Williamson and for the entertainment of customers. For about a year prior to July 4, 1957, the use of the boat by Williamson was negligible. Ross was free to use the boat and did frequently use it for himself and his family, and from time to time they would take customers or prospective customers of Holloway out on the boat. Ross, with the acquiescence of Williamson, assumed the responsibility for the maintenance of the boat.

"On July 3, 1957, Ross was using the boat and had trouble with the bilge pump. The following day he went to the boat yard to remove the pump in order to have it repaired. At the invitation of Ross, his personal and business friend, Francis Emerson, went with him. Emerson was an architect practicing in the area in which Holloway was engaged in the concrete and building materials business. When Ross and Emerson went on the boat, it was found that water was standing in the bilge and Ross decided to pump the water out before removing the pump. The pump was electrically operated. In order to avoid draining the power of the batteries while operating the pump, Ross chose to run the engine so that the generator might keep the batteries charged. The electric hookup was such that one or the other of the two batteries might be operated but in normal operation both batteries were not in use at any one time. Ross attempted unsuccessfully to start the motor with one of the batteries. He then threw a switch which cut that battery out and cut the other in. It

also was too weak to start the motor. He then concluded that both batteries should be hooked together to get the engine running. This was not an unusual practice and a jumper wire was kept on board for that purpose. Ross knew, as did Williamson, that sparks would or might fly off as this operation took place. Starting the motor by the use of the jumper wire required two people, one to hold the wire against the poles of the batteries and the other to manipulate the starting mechanism. Ross asked Emerson to assist. As Ross was explaining the method of hooking the batteries together and showing him the process, an electric spark caused an explosion of gas in the boat's bilge, the boat took fire, burned, and sank. Emerson died from injuries received by him.

"Judicial proceedings were initiated by the filing by Holloway of a petition for exoneration and for limitation of liability, under the Limitation of Shipowners' Liability Act, 46 U.S.C.A. § 182, et seq. A claim for damages to another boat[1] was listed with the claim of Ellen Emerson, wife of Francis Emerson [now the petitioner, hereinafter also "the widow"], for the wrongful death of her husband. Holloway proposed to convey the boat, then and thereafter at the bottom of the water in which it sank, to a trustee in discharge of its liability. Mrs. Emerson answered charging unseaworthiness and negligence, and denied the right of Holloway to the benefit of the limitation of liability. Mrs. Emerson filed a claim against Holloway for the negligent death of her husband asserting he was an invitee, that Holloway's negligence caused his death, and claimed damages in the amount of $200,000. To this claim Holloway filed an objection, saying its boat was seaworthy, and that the invitation of Ross to Emerson was not made in the scope of the employment of Ross. There was a denial of negligence of Holloway and its agents and employees."

[1] Actually, seven other boats; see *infra*, p. 5, and note 2.

The district court found that Ross, as an agent and employee of Holloway, had custody of the boat (R. 197). It accordingly concluded as a matter of law (R. 197) that

> "The unsafe and dangerous method used to start the motor on the 'Overtime' made the boat unseaworthy at the time of and prior to the accident. This condition was known to Williamson, the president of petitioner [Holloway] for some time prior to the accident. The petitioner, therefore, had knowledge and privity and is therefore liable for all damage proximately resulting from the accident."

Accordingly, the district court denied the corporation's petition for limitation of liability (R. 197), and in due course allowed recoveries aggregating $36,384.74 (including over $15,000 in hull underwriters subrogation) for the property damage caused, which included destruction of seven other motor yachts and a shipyard.[2]

With respect to the claim of the present petitioner, the district court found (R. 199) that—

> "Francis Emerson voluntarily accompanied the agent of the Petitioner [i.e., Ross, employee of the corporation] upon the boat on the day of the accident, and under circumstances disclosed by the evidence the Court finds that the said Emerson was a licensee on board the boat at the time of the accident; that the agent of the Petitioner, Thomas Ross, was not guilty of any gross or wanton negligence with respect to said Emerson."

Accordingly, the district court denied the widow's claim for the death of her husband (R. 200).

On appeal (R. 200), the court below held that, since she could not have recovered had her husband's death occurred on land in Florida, she could not recover when it occurred

---

[2] See Judge Brown's dissent, *infra*, pp. A11-A27. We have lodged with the Clerk of this Court a certified copy of the district court's final decree dated February 26, 1960, which allowed the above claims.

on navigable waters (R. 20) within the State of Florida (*infra*, pp. A1-A11). The judgment denying the widow's claim for wrongful death was therefore affirmed (*infra*, p. A28).

Judge Brown dissented (*infra*, pp. A11-A27). His view, here very briefly summarized, was that this case involved damage caused by conduct and not resulting from mere unseaworthiness without fault; that the distinction between an invitee and a licensee, which is controlling under Florida law on land, is irrelevant to the maritime law; that the Florida wrongful death statute shows by its terms that it incorporated the maritime standard in respect of maritime torts; and that accordingly the question, which in his view the majority of the court below never answered, is whether Emerson could have recovered if he had lived to sue in admiralty.

REASONS FOR GRANTING THE WRIT

The "substantial catastrophe" (*infra*, p. A13) that resulted from the explosion set off by the corporation's employee in this case destroyed seven boats and a boatyard, and cost the life of a human being. The owners of the boats (including the company that insured the hulls of three of the vessels) have recovered their damages. The boatyard owner has been made whole for his loss. If Francis Emerson had lived, even if he had been totally disabled and rendered incapable of everything save only the beating of his heart, he too would have recovered damages for his injuries; the invitee-licensee distinction that would have denied him recovery had the explosion taken place on land is irrelevant as a matter of maritime law, and so would be no bar where, as here, he was hurt on navigable waters. *Kermarec* v. *Compagnie Generale*, 358 U.S. 625. But, because he did not die from the burns suffered in the explosion until about five weeks later (R. 10), doubtless after suffering untold agony, his

widow is the sole victim of the accident who is held entitled to no compensation whatever.

A result so obviously unjust might conceivably be required by the law, however, much such a state of affairs would supply posthumous vindication for Dickens' Mr. Bumble. We submit, however, that the law is not thus unenlightened, and that a whole series of recent cases in this Court—wholly ignored by the majority below—required just the opposite decision.

First. Four cases here, only within the last two Terms, have laid down the proposition that, whenever wrongful death is caused on navigable waters of the United States that are within the territorial limits of a State, and whenever recovery rests on the terms of a State's wrongful death statute, the first inquiry must be whether such statute adopts or rejects the standards of liability laid down by the general maritime law. *The Tungus* v. *Skovgaard*, 358 U.S. 588; *United Pilots Assn.* v. *Halecki*, 358 U.S. 613; *Hess* v. *United States*, 361 U.S. 314; *Gyett* v. *Union Carbide Corp.*, 361 U.S. 340. In the first two cases cited, the Court of Appeals concerned construed the State statute involved, and its construction was accepted; in the last two, the Court of Appeals concerned did not construe the State statute involved; and its judgment was vacated in each instance with directions to ascertain the scope of that statute.

In the present case, therefore, the court below committed initial error in failing to construe the Florida wrongful death statute with a view to determining whether that statute adopted the standards of the maritime law in respect of maritime torts committed within the geographical limits of the State of Florida.

(We may note parenthetically that the reliance of the court below (*infra*, pp. A6-A7) on its prior decision in *Graham* v. *A. Lusi, Limited*, 206 F. 2d 223, is badly misplaced; that decision antedated the cases in this Court just cited, and is squarely contrary to all of them.)

Second. Does the Florida wrongful death statute here involved (Fla. Stat. 1959, § 768.01; *infra*, following p. A28) incorporate the standards of the maritime law? Once that provision is compared with wrongful death statutes from other States that United States Courts of Appeals have held, without assistance from the respective State courts of last resort but with the approval of this Court, to have incorporated admiralty standards, the answer is obviously in the affirmative.

We set out in Appendix C, in parallel columns, the New Jersey statute held in *The Tungus v. Skovgaard*, 358 U.S. 588, and in *United Pilots Assn. v. Halecki*, 358 U.S. 613, to embrace claims for unseaworthiness, and the West Virginia statute similarly construed by the Fourth Circuit in *Union Carbide Corp. v. Gantt*, 278 F. 2d 319, certiorari denied, October 10, 1960 (No. 247, this Term), following the remand directed by *Gantt v. Union Carbide Corp.*, 361 U.S. 340. Neither statute mentions water or ships, neither statute employs any admiralty terms. Yet both were held to incorporate the standards of liability imposed by the maritime law.

The present Florida statute is instinct with admiralty. It uses the terms "ship," "vessel," "boat," and it speaks of proceedings and libels *in rem* and *in personam*. *A fortiori*, therefore, the Florida statute adopted admiralty standards of liability. That point was so thoroughly and convincingly made by Judge Brown below (*infra*, pp. A19-A27) that we simply incorporate his discussion by reference.

While, as appears to be usual in this type of controversy, there is no State decision construing the scope of the State statute involved, it is the fact that the Florida Supreme Court has indicated that similar statutes are to be liberally construed.[1] Moreover, the Florida legislature has only

[1] Thus, the Florida Supreme Court has held that Fla. Stat. 1959, § 768.03, "Parties in actions for death of minor child; damages," is remedial in nature, and thus entitled to a liberal construction

recently broadened the coverage of the wrongful death act itself.[2]

In this instance, however, it is plain that the Florida statute shows on its face that maritime standards were meant to be adopted. Interestingly enough, the other state statute most similarly flavored with admiralty—the one considered in *Holley* v. *The Manfred Stansfield*, 269 F. 2d 317 (C.A. 4), certiorari denied *sub nom. Reederei Blumenfeld, G.M.B.H.* v. *Holley, Administratrix*, 361 U.S. 883—was also held to have incorporated the maritime law's rules of unseaworthiness. What Chief Judge Sobeloff said (269 F. 2d at 320) about the Virginia statute there considered—"it is too obvious to escape attention that the statute was drafted by one well versed in admiralty law"—is *a fortiori* applicable to the Florida statute here in question.

Accordingly, since Florida's wrongful death statute on its face adopted the rules of the general maritime law, so that the licensee-invitee distinction was inapplicable (*Kermarec* v. *Compagnie Generale*, 358 U.S. 625) and so that death resulting from unseaworthiness became compensable (*The Tungus* v. *Skovgaard*, 358 U.S. 588; *Goett* v. *Union Carbide Corp.*, 361 U.S. 340), it follows that Emerson could have recovered in admiralty had he lived, and it therefore similarly follows that his widow, petitioner here, was entitled

in favor of the beneficiaries. *Nolan* v. *Moore*, 81 Fla. 594, 600, 605, 88 So. 601, 605; *Klepper* v. *Breslin*, Fla., 83 So. 2d 587, 593. The Florida court has also stated, although in a case not in point on the facts, that it would be a strange condition which would require it to hold that, if a man is injured and lives, he may recover damages, but that if he dies before he has had an opportunity to be compensated, his widow may not recover damages for his death. *Cline* v. *Powell*, 141 Fla. 119, 132, 192 So. 628, 634.

[2] After the decision in *Whitley* v. *Webb's City*, Fla., 55 So. 2d 730, holding that the act did not include an action based on a warranty, the legislature by Laws 1953, c. 28280, § 1, added par. (2) to § 768.01, which states that the basic right of action shall include actions ex contractu.

to recovery after his death. The ruling below to the contrary flies in the face of the cited decisions of this Court.

Third. As we read the recent decisions here that have dealt with the impact of State wrongful death statutes on maritime torts occurring within State boundaries, they appear to hold that, while effect must be given to the more limited liability imposed by State statutes by comparison with the general maritime law (*The Tungus; Halecki*), a broader liability imposed by State law will likewise be given effect (*Hess*).

Contrariwise, there have been expressions of this Court asserting the supremacy of the maritime law on navigable waters (*Hess*, 361 U.S. at 318),[3] there have been similar individual expressions looking even more strongly in the same direction (*Hess*, 361 U.S. at 324-328), while one member of the Court is of the view that in all such cases the applicable law is the general maritime law as *remedially* supplemented by the State wrongful death act in question (*Goett*, 361 U.S. at 345-348).

We believe that the decisions as they now stand support the widow's recovery here, and require review—and reversal—of the ruling below, which disregarded those decisions. We wish to be free, however, to urge the broader ground that, once a State statute grants a right of action for wrongful death, such right of action incorporates the maritime law whenever the death occurs on navigable waters within the State. Accordingly, out of an excess of caution, we ask that *The Tungus* v. *Skovgaard*, 358 U.S. 588, be reconsidered, a request which we make with less diffidence inasmuch as, along with Judge Brown below (*infra*, p. A18) and the Fourth Circuit in *Union Carbide*

---

[3] "Since death occurred on navigable waters, the controversy is, as the trial court correctly held, within the reach of the admiralty jurisdiction. * * * Oregon would be required, therefore, to look to maritime law in deciding it."

Corp. v. *Goett*, *supra*, 278 F. 2d at 320-321, we believe that it no longer commands the concurrence of a majority of the Court.

CONCLUSION

The inequitable result reached below flows directly from a disregard of applicable rulings here. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioner.

ALTON G. PITTS,
135 Wall Street,
Orlando, Florida,
Of Counsel.

NOVEMBER 1960.